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No. 84-849

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit Misapplied the Holding in *Hutto* v. *Finney*, 437 U. S. 678 (1978), When It Ruled That the Commonwealth of Kentucky Was Liable for Attorneys' Fees Under 42 USC § 1988 Even Though the Commonwealth Had Been Dismissed as a Party Defendant and Even Though the Relief Granted the Plaintiffs Against the Remaining Party Defendants Was Strictly Retrospective in Nature.

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COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - - - - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY, - - - - - - - - - *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

May it please the Court:

OPINION BELOW

The *per curiam* Opinion and Order of the United States Court of Appeals for the Sixth Circuit in this case is an unpublished opinion. It is nevertheless listed among the unpublished opinions as *Graham* v. *Wilson,* 742 F. 2d 1455 (6th Cir. 1984). The opinion and order are set out in full in the Appendix to the Petition for Writ of Certiorari, hereinafter "Pet. App.," 1a-2a.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit was entered on August 30, 1984. The petition for writ of certiorari was filed on November 26, 1984, and certiorari was granted on January 14, 1985. The jurisdiction of this Court is conferred by 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Eleventh and the Fourteenth Amendments. The text is set out below.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Eleventh Amendment to the United States Constitution.

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legis-

lature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article." Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 USC § 1983 and 42 USC § 1988. The text is set out below.

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 USC § 1983.

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USC § 1988.

STATEMENT OF THE CASE

On November 7, 1979, Kentucky State Trooper Eddie Harris was shot in cold blood at point blank range. Clyde Daniel Graham became the chief suspect when his step-mother's car was found in the vicinity with his driver's license and billfold being found in the bushes nearby. The Kentucky State Police assembled a group of troopers and searched the home of Clyde's father, James E. "Buddy" Graham. The six plaintiffs were arrested at this time. Physical injuries were caused to Buddy Graham. State Police Commissioner Kenneth Brandenburgh was not present nor did he participate in the initial decision to go to Graham's home. Commissioner Brandenburgh drove to the Elizabethtown vicinity and was in the vicinity during the second search. Brandenburgh, nevertheless, denied participating in the search. Pet. App., 4a.

The plaintiffs filed suit on September 16, 1980, against the Commonwealth of Kentucky, the state police officers involved in the search solely in their individual capacities, Kenneth Brandenburgh both individually and in his official capacity as Commissioner of the State Police, the City of Elizabethtown, the City of Hodgenville, and police officers of the City of Elizabethtown, the City of Hodgenville, and Hardin County who were involved in the search, in their individual capacities only. The plaintiffs sought monetary damages. They have not sought injunctive or declaratory relief at any time.

The Commonwealth of Kentucky was dismissed as a party on November 26, 1980. Pet. App. 14a. The

district court dismissed the Commonwealth of Kentucky based on the Eleventh Amendment to the United States Constitution. The court further stated in its order that:

> ". . . The relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978), and *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that attorney's fees may be awarded against the state in an action by a private litigant only when the relief sought is prospective in nature . . ." Pet. App. 14a.

As the result of the foregoing order the Commonwealth of Kentucky did not participate any further in this case until the question of counsel fees was raised.

The Attorney General of Kentucky filed a report after investigating the events which occurred during the search of the Graham home. The report concluded that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Pet. App. 26a-28a. As a consequence of the failure of these officers to observe state policy, the Commonwealth of Kentucky has never supported either the Kentucky State Police troopers who were named individually or Kenneth Brandenburgh in any manner. Each of these individuals has been represented by a private attorney who was paid by private funds throughout the case. The Commonwealth of Kentucky has not contributed to or paid the costs of litigation for any of the troopers or for the Commissioner. The Commonwealth of Ken-

tucky specifically did not contribute in any form or fashion to the monetary damages that the named defendants agreed to pay in settlement of the case.

The Commonwealth of Kentucky was not notified of any negotiations to settle this case and did not participate in the negotiations. The Commonwealth was not served with and did not see a copy of the *in camera* settlement until after both the appellants' and the appellees' briefs were filed in the United States Court of Appeals for the Sixth Circuit. In other words, the resulting July 1, 1982, settlement was fashioned without the Commonwealth of Kentucky being represented. This settlement details that the plaintiffs shall receive $45,000.00 in damages paid on an installment basis from Kenneth Brandenburgh personally and as agent for the Kentucky State Police Legal Fund, a voluntary association. The City of Elizabethtown had previously settled with the plaintiffs for $5,000.00. Hardin County settled with the plaintiffs for $10,000.00 for and on behalf of Dewey Skaggs, Charles David Logsdon, Overland Payne and David Owsley. The District Court did not assess any costs or attorneys' fees against either the City of Elizabethtown or Hardin County. Contrary to the respondents' assertions, the *in-camera* agreement does not address fault. A copy of the *in-camera* settlement is contained in a sealed envelope in the Office of the Clerk of the United States Supreme Court.

On July 1, 1982, the District Court entered an order styled, Agreed Order Dismissing Settled. The settlement is as follows:

"By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.
3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.
4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.
5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kenturky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved." Pet. App. 15a to 17a.

No attorney for the Commonwealth signed the Agreed Order nor was advised of the Order until after the fact. The Commonwealth likewise had no knowledge of the language of underlying *in-camera* settlement until over sixteen months later.

On September 2, 1982, Judge Allen signed an order granting the plaintiffs attorneys' fees from the Commonwealth of Kentucky without holding a hearing. Pet. App. 18a. The Commonwealth had no notice prior to the signing of this Order that attorneys' fees were being sought. The Commonwealth through the Justice Cabinet and through the Office of Attorney General filed Motions to Vacate the Order granting attorneys' fees and supporting Memoranda. The Court held a hearing on November 2, 1982, to decide whether attorneys' fees should be allowed and, if allowed, the amount of the fees. On November 15, 1982, the Court found that the Commonwealth was responsible for the plaintiffs' costs in the amount of $64,878.82, including $58,521.71 in attorneys' fees, even though the Commonwealth and Commissioner Brandenburgh had been dismissed as party defendants, and even though the troopers were dismissed as parties. Pet. App. 12a, 13a. Perhaps it is even more important to note that the plaintiffs sought only damages. The plaintiffs did not ask for nor did they receive declaratory or injunctive relief at any time. In connection with the foregoing relief, the Court directed that no claim for attorneys' fees shall be made by any of the plaintiffs against any individual defendants. Pet. App. 16a. The court did not assess any costs in the action against either Hardin County or the City of Elizabethtown.

The United States Court of Appeals for the Sixth Circuit upheld the lower court's decision.

SUMMARY OF THE ARGUMENT

The Eleventh Amendment to the United States Constitution renders an unconsenting state immune from suit in federal court. Although this court has construed the Eleventh Amendment as an absolute bar to an award of damages against a state, it has never construed the Amendment to bar relief which has the practical effect of prospective relief against a state.

Under the "American" rule a prevailing litigant is not entitled to attorneys' fees from the losing party in absence of statutory authority. In adopting 42 USC § 1988 Congress has provided for attorneys' fees to the prevailing party in civil rights actions under the "private attorney general" theory. The Eleventh Amendment, however, prohibits awarding attorneys fees against a state unless the fees are ancilliary to prospective relief on the merits. *Hutto* v. *Finney,* 437 U. S. 678 (1978).

The Sixth Circuit misapplied *Hutto, supra* to the instant case. In *Hutto,* the relief awarded by the court was against the state and prospective in nature. In the case at bar, the state was dismissed as a party defendant, and the relief imposed against the remaining defendants was limited to damages.

In adopting 42 USC § 1988 Congress provided that fees were to be awarded only to a prevailing party. Contrary to *Hutto, supra* the district court awarded attorneys' fees against the Commonwealth despite the fact that the Commonwealth was a prevailing party. Vicarious liability is an improper basis for imposing liability on a sovereign unless there is proof that the

individual found liable was following a policy adopted by the sovereign. In the case at bar, the proof indicated that the individual defendants were violating state policy. As a result the Commonwealth refused to either represent them or provide for their representation.

The Sixth Circuit misapplied *Hutto, supra* and violated the Eleventh Amendment by rendering a decision affirming the district court.

ARGUMENT

The United States Court of Appeals for the Sixth Circuit Misapplied the Holding in *Hutto* v. *Finney*, 437 U. S. 678 (1978), When It Ruled That the Commonwealth of Kentucky Was Liable for Attorneys' Fees Under 42 USC § 1988 Even Though the Commonwealth Had Been Dismissed as a Party Defendant and Even Though the Relief Granted the Plaintiffs Against the Remaining Party Defendants Was Strictly Retrospective in Nature.

In the case at bar the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Western District of Kentucky, awarding respondents, plaintiffs below, in a 42 USC § 1983 action $64,878.82 in costs, including $58,521.71 in attorneys' fees against the Commonwealth of Kentucky. In its *per curiam* opinion the Sixth Circuit reasoned that it was proper under *Hutto* v. *Finney,* 437 U. S. 678 (1978), to award under 42 USC § 1988 costs including attorneys' fees against the state in a civil rights action, even though the state was dismissed as a party defendant, and even

though the relief awarded against the remaining defendants was strictly retrospective in nature. The decision of the Sixth Circuit requires the Commonwealth of Kentucky to pay the costs in a civil rights action despite the fact that Kentucky was a prevailing party as to the plaintiffs and despite the fact that the relief was limited to damages.

I.

The Relief Granted on the Merits Was Strictly Retrospective.

A. THE GENERAL RULE AS TO ATTORNEYS' FEES

In *Alyeska Pipeline Services Co.* v. *The Wilderness Society,* 421 U. S. 240 (1975), this Court set out the general rule as to attorneys' fees. This "American" rule is as follows:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. . . ." *Id.,* at 247.

There are two principal exceptions to the "American rule." First, a court may in exceptional circumstances award an attorney's fee to a prevailing party when the losing party has acted in "bad faith."[1] Secondly, a court may award an attorney's fee when authorized to do so by federal statute. In *Alyeska, id.,* this Court rejected a counsel fee based upon a determination by a court that private counsel vindicated a significant governmental interest. This Court said that in absence of

[1]The case at bar does not involve the "bad faith" exception. The attorneys' fees were awarded under 42 USC § 1988.

statutory authority the "private attorney general" theory could not support an award of counsel fees.

In *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400 (1968) a reasonable counsel fee was approved under the "private attorney general" theory. But the theory had been adapted by Congress as a basis for a fee in 42 USC § 2000a-3(b). In *Northcross* v. *Board of Education,* 412 U. S. 427 (1973), a reasonable counsel fee based upon another statute invoking the "private attorney general" theory was likewise approved. In *Northcross, Id.,* the statutory basis was § 718 of the Emergency School Aid Act of 1972, 86 Stat. 369.

In *Hutto, supra,* this Court considered a civil rights action against officers of the Arkansas penal system. The district court found that the conditions in the penal system constituted cruel and unusual punishment and fashioned injunctive relief to remedy the situation. The district court also found "bad faith" on the part of the defendants and awarded plaintiff an attorney's fee to be paid out of the funds of the Arkansas Department of Corrections. The Court of Appeals affirmed and awarded the appellee an attorney's fee for the appellate work as a prevailing party under 42 USC § 1988. In approving the attorney's fee awarded by the district court, this Court indicated that the fee vindicated the Court's authority over a recalcitrant litigant. However, the attorney's fee awarded by the Court of Appeals had to be examined further since it was not based on "bad faith."

B. THE EFFECT OF THE ELEVENTH AMENDMENT ON ATTORNEYS' FEES

The Eleventh Amendment has long been interpreted as rendering an unconsenting state immune from suit brought in federal court by citizens of that state[2] *Hans* v. *Louisiana,* 134 U. S. 1 (1890). However, the Eleventh Amendment does not prohibit a federal court from enjoining state officials. *Ex parte Young,* 209 U. S. 123 (1908). Although this Court reiterated in *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that the Eleventh Amendment is no bar to prospective relief against state officials, it made it quite clear that the Amendment does operate as a bar to retrospective monetary relief against a state. Congress is, nevertheless, authorized by Section 5 of the Fourteenth Amendment to abrogate the immunity provided by the Eleventh Amendment. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976).

A federal district court may award counsel fees in absence of a finding of "bad faith" whenever Congress provides a statutory basis. In 42 USC § 1988 Congress provided a statutory basis for attorneys' fees to prevailing parties in civil rights cases brought under 42 USC §1983. However, when a state is involved in the litigation and is the losing party, the Eleventh Amendment bars a recovery of counsel fees unless Congress has abrogated the Amendment.

> "As this Court made clear in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 . . . Congress has plenary

[2]Kentucky has never consented to being sued in federal court. This, however, is not an issue in question in the case at bar.

power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed the Act primarily applies to laws passed specifically to restrain state actions. See e.g., 42 USC § 1983 [42 USCS § 1983]." *Hutto, supra* pp. 693, 694.

Congress adopted 42 USC § 1983 pursuant to Section 5 of the Fourteenth Amendment in an effort to enforce Section 1 of the Amendment. Congress adopted 42 USC § 1988 in 1976 in an effort to encourage public policy by enforcing the civil rights laws. The purpose of 42 USC § 1988 was to promote the use of a "private attorney general" to preserve the rights of the people.

It is abundantly clear that Congress has abrogated the Eleventh Amendment in order to provide attorneys' fees for prevailing litigants under 42 USC § 1983. But in order to determine the extent of abrogation it is necessary to examine the legislative history of 42 USC § 1988.

> "* * * There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." Senate Report No. 94-1011, 94th Congress, Second Session, 1976, 5 U. S. Code Congressional and Administrative News 5908, p. 6.

Congress had enforcement in mind when it adopted 42 USC § 1988. In 42 USC § 1988 Congress authorized attorneys' fees to prevailing litigants when the courts grant prospective relief against state officers. Congress did not intend for 42 USC § 1988 to authorize attorneys' fees against a state when damages alone are awarded.

Edelman, supra, held that the Eleventh Amendment was a bar to retrospective relief against a state but that it was not a bar to prospective relief against a state officer with an ancillary effect on the state treasury. *Hutto, supra,* held that attorneys' fees are properly part of the ancillary effect on the state treasury when prospective relief is granted.

> "* * * The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards. H R Rep No 94-1558, p. 9 (1976). . . ." *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U. S. 719, 738, 739 (1980).

In *Hutto, supra,* the plaintiff prevailed against state officers and in doing so obtained prospective re-

lief. The Court of Appeals awarded an attorney's fee under 42 USC § 1988 to the prevailing party against the state. The award of the attorney's fee had an impact on the Arkansas Treasury ancillary to the injunctive relief granted on the merits.

On the other hand, the situation in the case at bar is vastly different from that in *Hutto, supra.* The respondents did not prevail against the Commonwealth of Kentucky. The respondents prevailed against the remaining defendants and solely in their individual capacities. The relief granted the respondents was retrospective rather than prospective in nature. The Sixth Circuit, nevertheless, held *Hutto, id.,* applicable and awarded costs including attorneys' fees directly against the Commonwealth of Kentucky. The Court awarded no costs against any of the other named defendants.

The Decision of the Court of Appeals for the Sixth Circuit is contradictory to the rationale of *Hutto, supra,* and the line of cases leading up to the *Hutto* decision. The decision of the Sixth Circuit is in total disregard of the Eleventh Amendment to the United States Constitution.

II.

The Commonwealth of Kentucky Was a Prevailing Party as to the Plaintiffs.

The Eleventh Amendment to the United States Constitution is a bar to an action in federal court against a state. *Pennhurst State School and Hospital* v. *Halderman,* —— U. S. ——, 79 L. Ed. 2d 67, 104

S. Ct. 900 (January 23, 1984). Congress, of course, is authorized by Section 5 of the Fourteenth Amendment to abrogate the immunity provided by the Eleventh Amendment. *Fitzpatrick, supra.* But the intent to override the Eleventh must be unequivocal. *Quern* v. *Jordan,* 440 U. S. 332 (1979).

The Eleventh Amendment has no application when a municipality is named as a party defendant. *Monell* v. *New York City Department of Social Services,* 436 U. S. 658 (1978). This Court, nevertheless, held in *Monell, id.,* that a municipality cannot be held liable solely on the basis of vicarious liability. In order to support a claim against a municipality for a violation of civil rights, a party must demonstrate that the officers of the municipality were by their acts advancing a policy adopted by the city.

A state may not be named as a party defendant by virtue of the Eleventh Amendment. It is, nevertheless, proper for a Court when fashioning prospective relief against state officers to award counsel fees having only an ancillary effect on the state treasury. This is because the prospective relief against the state officers is for all practical purposes an injunction against the state. *Hutto, supra.* Surely this does not mean, however, that when a state is involved rather than a municipality, the party seeking attorneys' fees should be held to a lesser standard of proof as to whether the officer was following state policy. Yet this is exactly what has occurred in the instant case. The Sixth Circuit affirmed an award of attorneys' fees against the Commonwealth of Kentucky despite the fact that

Commonwealth was dismissed as a party defendant and despite the fact that no prospective relief was awarded to the respondents. The award of attorneys' fees was made solely on the basis of *respondeat superior* and was in violation of *Monell, supra,* since there was no proof that the Commonwealth had adopted a policy approving conduct such as was exhibited by the police officers in the search of the Graham house. In fact, the proof shows exactly the opposite. The appendix to the memorandum submitted by the Attorney General in support of his Motion to Vacate the Order Granting Attorneys' Fees contains a Report of the Attorney General. Pet. App. 26a-28a. The report concludes that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Pet. App. 26a-28a. The officers violated state policy during the search. The Commonwealth of Kentucky refused to either represent the police officers or to provide counsel for them. Further, the Commonwealth refused to pay any of the costs or damages assessed against the officers.

In *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981) the Court of Appeals for the Third Circuit considered a case wherein Morrison sued the City of Pittsburgh and several of its police officers under 42 USC § 1983 for false arrest. In a non-jury trial the district court found for Morrison as to the police officers and awarded damages. The court found for the City of Pittsburgh as to the claim of Morrison because the evidence failed to demonstrate that the individual acts of the police officers were an implementation of the city's policy.

No prospective relief was awarded. The district court awarded Morrison an attorney's fee against the officers but not against the city. In affirming the denial of an attorney's fee against the City of Pittsburgh, the Court of Appeals said:

> "* * * Before Morrison can obtain costs he must, against the city, be a prevailing party. In a case such as this, in which he sought only money damages, and in which he failed to satisfy the court that his case satisfied the standards of *Monell* v. *Department of Social Services, supra,* he does not qualify as the prevailing party with respect to the only claim which was before the court . . . ." *Morrison, Id.,* p. 88.

In *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980), the United States Court of Appeals considered a civil rights action against a county, city, and law enforcement officers for unlawful arrest and for cruel and unusual punishment. The district court dismissed the county and city from the action but rendered a judgment on a jury verdict against two law enforcement officers. The court awarded attorneys' fees against the law enforcement officers but not against the county and city. No injunctive relief was fashioned. In reviewing the denial of attorneys' fees against the county and city, the Fifth Circuit said:

> "* * * Appellants have cited no authority for the proposition that attorneys' fees may be awarded against parties properly dismissed from the action merely because they were 'prevailing parties' with respect to other parties in the suit.

> Indeed, an award against Brazoria County and the City of Clute under the circumstances of this case would turn the meaning of 'prevailing party' on its head, since the district court expressly found, as a matter of law, that neither entity was liable to the appellants. The failure to award attorneys' fees against Brazoria County and the City of Clute was proper." *Dean, supra,* pp. 1337, 1338.

Two years later in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982), the Fifth Circuit reiterated its position. In *Berry, id.,* the plaintiff filed a civil rights action against the Town of Maben, Mississippi and McLemore, a police officer employed by the town. The plaintiff sustained injuries during an arrest made by McLemore. Berry alleged that the town was liable vicariously and directly for the injuries. The trial court directed a verdict for the town and entered a judgment pursuant to a jury verdict for the plaintiff against the police officer in the amount of $10,000. The court assessed the police officer $5,000 in attorneys' fees. The court refused to award attorneys' fees against the town. No prospective relief was granted. In affirming the refusal of the trial court to assess attorneys' fees against the town the Fifth Circuit said:

> "* * * A plaintiff in a § 1983 suit may not be awarded attorneys' fees against a party properly dismissed from the action merely because the plaintiff prevailed against another party in the suit. This is so even where the party dismissed from the suit is the governmental entity that employed the culpable defendant. *Dean* v. *Gladney,* 621 F. 2d 1331, 1337-38, (5th Cir. 1980), *cert. denied,* 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981)." *Berry, supra,* p. 34.

In *Morrison, supra; Dean, supra;* and *Berry, supra,* the respective Courts of Appeals held that where no prospective relief was awarded any defendant, and where the county or municipality was properly dismissed as a party defendant, no attorneys' fees could be assessed against the county or municipality. The decisions in these cases are contrary to that reached in the case at bar.

In *Hutto, supra,* the relief entered against the Arkansas Penal System was prospective in nature and was for all practical purposes against the State of Arkansas. Arkansas was not a prevailing party. In the case at bar the Commonwealth of Kentucky was dismissed as a party defendant. The relief on the merits was strictly against the other named defendants in their individual capacities. These defendants had violated state policy. Unlike the situation in *Hutto, id.,* the relief was not against the Commonwealth. In awarding the attorneys' fees in the case at bar the district court violated the Eleventh Amendment to the United States Constitution. The only basis for attorneys' fees in the case at bar was vicarious liability in violation of *Monnell, supra.* The proof shows that the police officers were acting contrary to state policy.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit misapplied a decision of this Court when it

held that *Hutto, supra,* authorized attorneys' fees in the case at bar. In *Hutto, id.,* the relief was prospective, the Attorney General had defended the corrections officers all along, the state of Arkansas never indicated that the officers were violating state policy, the litigation involved the state policy as to prison conditions which had been perpetrated for years, and Arkansas was the losing party. On the other hand, in the instant case, the relief was strictly retrospective, the Commonwealth was dismissed as a party defendant, the Commonwealth did not provide for the representation of the officers or for the settlement, and finally, the Report of the Attorney General indicates that the police officers violated state policy.

We submit that this Court should for the foregoing reasons reverse the Opinion and Order entered herein by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondents by depositing three copies of same in the United States mail, first class postage prepaid, this 27 day of February, 1985, addressed to:

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